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NO. 81-133

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DENNIS WISE,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the trial judge correctly rule that testimony regarding conspiracies to murder for which Petitioner was acquitted was not inadmissible for reasons of collateral estoppel in a subsequent trial for the substantive crime of murder of one of the victims of the conspiracies?

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PRELIMINARY COMMENT

This Brief of Respondent in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Court dated August 18, 1981.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland of May 27, 1981, denying Petitioner's Petition for Writ of Certiorari to the Court of Special Appeals of Maryland is included as an Appendix to this Brief. The Opinion of the Court of Special Appeals of Maryland, Wise v. State, 47 Md. App. 656, 425 A.2d 652 (1981), is appended to the Petition.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution:

[Amendment V]

[Rights of Accused in Criminal Proceedings]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Dennis Wise, Petitioner, was charged with conspiracy to murder James Reid, conspiracy to murder B.A. Addison, and the murder of Reid. The State concluded its case on September 24, 1979 in a joint trial on all three charges at which time the Criminal Court of Baltimore (Greenfeld, J.) granted Petitioner's motion for acquittal of conspiracy to murder Reid. At the conclusion of the State's case, the Criminal Court of Baltimore granted Petitioner's motion to sever the remaining charges, i.e., conspiracy to murder Addison and the murder of Reid, requiring the State to elect which of those two remaining charges should be decided in the first trial. Because Petitioner's co-defendant, Wiley, was being tried as well, the State elected to proceed with the conspiracy charge, and a mistrial was declared on the murder charge. Petitioner was eventually found by the jury to have been not guilty of conspiracy to murder Addison.

Thereafter, Petitioner moved to dismiss the murder charge on grounds, inter alia, of double jeopardy, contending that the doctrine of collateral estoppel precluded the admissibility in the murder trial of any of the evidence considered at the trial which resulted in acquittals of the conspiracy charges. The motion was denied, the evidence was admitted, and Petitioner was convicted by a jury in the Criminal Court of Baltimore (Dorf, J.) of Reid's murder.

Petitioner filed a timely appeal to the Court of Special Appeals, which affirmed the conviction. Wise v. State, 47

Md. App. 656, 425 A.2d 652 (1981). See the Appendix (Apx.) to the Petition. A fuller discussion of the facts may be found in that opinion at 47 Md. App. at 657-62, 425 A.2d at 654-56, Petition at Apx. 1-11. Petitioner's Petition for Writ of Certiorari to the Court of Special Appeals was denied. Wise v. State, Pet. Dkt. No. 38, Sept. Term, 1981 (Md., Order by Murphy, C.J., dated May 27, 1981), appended hereto.

ARGUMENT

COLLATERAL ESTOPPEL DOES NOT RENDER INADMISSIBLE, IN A TRIAL FOR THE MURDER OF REID, EVIDENCE OF THE CONSPIRACY TO MURDER REID AND ADDISON FOR WHICH PETITIONER HAD BEEN ACQUITTED BECAUSE THE FACTFINDER IN THE CONSPIRACY TRIAL WAS NOT CONCERNED WITH PREMEDITATION OR DELIBERATION AND THUS DID NOT NECESSARILY DETERMINE THOSE ELEMENTS IN PETITIONER'S FAVOR.

Stripped of its embellishment by the history of collateral estoppel, Petitioner's argument is simply that the trial judge and, therefore, the Court of Special Appeals of Maryland, erred in admitting, in a trial for the substantive crime of murder of the victim of one conspiracy, testimony regarding conspiracies to murder for which Petitioner either was acquitted or in which a directed verdict was entered. Petitioner asserts,

> "The Court [of Special Appeals of Maryland] distinguishes that evidence of acts for which the accused has been acquitted can be re-litigated in a subsequent trial so long as the act does not constitute an ultimate fact.

* * *

> There is no question but that Dennis Wise was acquitted of the conspiracy to murder James Reid in a first trial. There is also no question that the state sought to use the alleged agreement between Wiley and Wise to establish the premeditation and deliberation of premeditated murder. The Maryland Court of Special Appeals suggests that this type of evidence is not one of ultimate fact, but only evidentiary fact and as such, a distinction can be made." Petition at 16, 37.

Several aspects of this case support the conclusion of the Court of Special Appeals of Maryland that admission of evidence of the conspiracy to murder Reid and Addison was not precluded by collateral estoppel at Petitioner's retrial for Reid's murder.

First, Petitioner was never found factually not guilty of the conspiracy to murder Reid. Rather, the State's only evidence at the trial of that conspiracy came in the form of hearsay testimony from Derochea Leak. She was found by the trial court, however, not to have been a coconspirator, and thus she could not give that testimony under Maryland law. 47 Md. App. at 659, 425 A.2d at 655, Petition at Apx. 5. Petitioner's motion for acquittal was granted, and, there having been no factual resolution in Petitioner's favor with regard to that conspiracy, analysis under collateral estoppel was not triggered.

Second, Petitioner's assertion is basically that no evidence produced at the first trial should be admissible at the second. He is seeking now to turn his own tactical trial decision against the State. The severance of the charges of conspiracy to murder Addison and murder of Reid was at the behest of defense counsel, who suggested that the trial judge follow the procedure in Ellerba v. State, 41 Md. App. 712, 727-30, 398 A.2d 1250, 1258-60, cert. denied, 285 Md. 729, 734 (1979), and wait until the end of the State's case—until which time the State could produce evidence of conspiracy as substantive evidence of murder—before ruling on the severance motion. It was the fault of Petitioner, and not the State, that a second trial and, therefore, a second chance at a conviction, on the murder charge was necessitated. The State was ready, willing, and able to try jointly the conspiracy and substantive murder charges. The State did not seek to take advantage of a multiple trial situation, as Arkansas did in Turner v. Arkansas, 407 U.S. 366 (1972), on which Petitioner relies. In Turner, Arkansas, which was prohibited by law from joining a murder and robbery charge, sought to try Turner for robbery after he had been acquitted for murder. The robbery prosecution was held barred on grounds of collateral estoppel:

> "Had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the

> murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery...." 407 U.S. at 369.

Unlike the situation in Turner v. Arkansas, the acquittal of conspiracy to murder Reid did not result necessarily in the determination of any ultimate facts in Petitioner's favor. Indeed, as noted above, the granting of the motion for acquittal was based on a technicality, for the testimony of prosecution witness Derochea Leak, without which the State conceded it had no case, was ruled inadmissible as substantive proof of guilt.

Finally, Petitioner's acquittal of conspiracy to murder Addison does not mean that the jury necessarily determined in Petitioner's favor the ultimate fact that Petitioner did not murder Reid. As the Court of Special Appeals of Maryland stated:

> "The purpose of the evidence in the conspiracy cases was to prove the ultimate fact of a combination. Whether that combination existed is not essential either to the motive of appellant in killing the victims or to whether he deliberated upon it in advance. Although the two factfinders were permitted to view and hear some of the same factual evidence, the 'ultimate fact' which they were to decide was entirely different. The first factfinder did not ever decide, nor need to decide, whether appellant killed Reid; nor was there a need to decide that issue as to Addison. It follows that the first factfinder had no reason to concern itself with

> motive or with premeditation, which were the only related concerns of the second factfinder. The second factfinder, on the other hand, was not concerned with whether there was or was not a conspiracy. Although all conspiracies must presuppose elements of premeditation and deliberation, that which is significant here is that the converse is not true." 47 Md. App. at 670, 425 A.2d at 660, Petition at Apx. 27-28.[1]

The opinion of the Court of Special Appeals of Maryland cannot be interpreted, as Petitioner suggests, Petition at 17, to preclude the application in Maryland of the doctrine of collateral estoppel on the theory that, because juries in Maryland judge both law and fact, a jury could acquit based on a legal, rather than a factual, analysis. See 47 Md. App. at 671 n. 2, 425 A.2d at 661 n. 2, Petition at Apx. 29 n. 2. In Stevenson v. State, 289 Md. 167, 180 (1980), the Court of Appeals of Maryland made clear that juries judge the law only to the extent that counsel dispute aspects of the law in their arguments to the jury. There is nothing in the record in the instant case, and Petitioner does not suggest to the contrary, which reflects that the jury which found Petitioner not guilty of conspiracy to murder Addison was presented with any dispute as to the law of conspiracy. No one took issue with

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[1] Premeditation and deliberation could have been inferred from the cause of death, i.e., two gunshot wounds to the head. Chisley v. State, 202 Md. 87, 108, 95 A.2d 577, 587 (1953).

the jury argument by counsel for co-defendant Wiley that "a conspiracy... is... a combination between two or more persons to commit or accomplish a criminal act."

Petitioner seeks shelter under cases such as United States v. Keller, 624 F.2d 1154 (3d Cir. 1980), wherein it was held that the doctrine of collateral estoppel barred the cross-examination of Keller regarding drug transactions for which he had interposed a successful defense of entrapment. These cases are inapposite, however, for, unlike the decision of the Court of Special Appeals of Maryland in the instant case, admissibility was not decided in them by whether certain facts were "ultimate facts," i.e., those "necessarily determined" in the defendant's favor in view of the acquittal and necessary to sustain the conviction sought at the subsequent trial. Whether those facts decided in a defendant's favor were "ultimate facts" was deemed not relevant. Rather, the Keller line of cases holds that facts, whether "ultimate" or merely "evidentiary," which, because of a factual acquittal, are decided in a defendant's favor, cannot be relitigated. Of these cases, the Court of Special Appeals of Maryland correctly stated:

> "That is but a tiny step from holding that no evidence introduced in a case resulting in an acquittal may ever be used in a subsequent prosecution for any purpose — but even there it does fall short of that extreme. We cannot believe that any jurisdiction would close that last gap, especially in conspiracy cases and their underlying crimes. We are certainly

> satisfied that Maryland would not. If such broad interpretation were placed upon the doctrine of collateral estoppel, it could not stand together with the well-established principle that an acquittal of a conspiracy to commit a crime does not bar a subsequent prosecution of the crime." 47 Md. App. at 666, 425 A.2d at 658, Petition at Apx. 19.

Public policy dictates, therefore, that, under the proper analysis—whether an ultimate fact was determined in a defendant's favor—Petitioner could not prevail on the Question Presented.

CONCLUSION

For the foregoing reasons, review of the Question Presented is not within the contemplation of Sup. Ct. R. 17.1, and Respondent thus prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

DENNIS WISE	:	IN THE
	:	COURT OF APPEALS
v.	:	OF MARYLAND
STATE OF MARYLAND	:	Petition Docket No. 38 September Term, 1981
	:	(No. 674, Sept. Term, 1980 Court of Special Appeals)

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ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: May 27, 1981.